

David B. Rosenbaum (009819)  
Travis C. Hunt (035491)  
BriAnne N. Illich Meeds (036094)  
OSBORN MALEDON, P.A.  
2929 North Central Avenue, 21st Floor  
Phoenix, Arizona 85012-2793  
Telephone: (602) 640-9000  
drosenbaum@omlaw.com  
thunt@omlaw.com  
billichmeeds@omlaw.com  
***Counsel for C.M. Plaintiffs***

*(Additional Counsel for Plaintiffs Listed on the Signature Page)*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

C.M., on her own behalf and on behalf of her  
minor child, B.M.; et al.

Plaintiffs,

v.

United States of America,

Defendant.

No. 2:19-cv-05217-SRB

**PLAINTIFFS' OPPOSITION  
TO DEFENDANT'S MOTION  
TO SEAL (Dkt. 400)**

1 Plaintiffs oppose Defendant's request to seal Exhibit D and the corresponding  
 2 portions of Defendant's Controverting and Supplemental Statement of Facts. *See* Def.'s  
 3 Mot. to Seal (Dkt. 400). The excerpted testimony of former CBP Commissioner Kevin  
 4 McAleenan is not confidential, and Defendant has not met the "compelling reasons"  
 5 standard to seal this material.<sup>1</sup>

6 There is a "a strong presumption in favor of access to court records." *Foltz v. State*  
 7 *Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). As noted by the Court, a  
 8 party seeking to overcome this presumption and file materials under seal in connection  
 9 with dispositive motions—such as Defendant's Opposition to Plaintiffs' Motion for  
 10 Partial Summary Judgment here—must provide a compelling reason for doing so. *See*  
 11 Order Granting Mots. to Seal at 2 (Dkt. 322) (citing *Ctr. for Auto Safety v. Chrysler Grp.*,  
 12 *LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016)). Under the "compelling reasons" standard,  
 13 Defendant must "articulate compelling reasons supported by specific factual findings that  
 14 outweigh the general history of access and the public policies favoring disclosure."  
 15 *Kamakana v. Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006) (quotations omitted).  
 16 "[C]onclusory statements about the content of the documents," such as "that they are  
 17 confidential" or "that, in general, their production would, amongst other things, hinder"  
 18 law enforcement operations, "do not rise to the level of 'compelling reasons' sufficiently  
 19 specific to bar the public access to the documents." *Id.* at 1182; *see also Unknown Parties*  
 20 *v. Johnson*, 2016 WL 8199309, at \*4 (D. Ariz. June 27, 2016) (explaining that "blanket  
 21 claims of privacy or law enforcement," such as assertions that disclosure "could impede"  
 22 a law enforcement mission, are insufficient).

23 Portions of the testimony Defendant seeks to seal have already been released to  
 24 the public: Defendant itself filed pages 335 and 344 of McAleenan's deposition transcript  
 25 (which are included in the excerpt Defendant seeks to seal here) on the public record in  
 26

---

27 <sup>1</sup> Defendant also asks to seal a direct quote from Plaintiffs' Exhibit 9 contained in the  
 28 Controverting Statement of Facts. Plaintiffs' opposition to sealing Exhibit 9 is set forth  
 in Dkt. 373 and 373-6 at 3.

1 this case. *See* United States Exhibit A, Attachment 1, McAleenan Dep. at 335, 344, Dkt.  
2 372-1. Defendant’s current view that the exhibit “contains sensitive, pre-decisional  
3 deliberations, addressing the development of immigration policy” is further undermined  
4 by the fact that Defendant did not designate lines 340:5–343:25 as confidential under the  
5 terms of the protective order. Defendant cannot reverse course now.

6 Defendant’s “concern” that release of this testimony would “chill[] candid  
7 discussion and deliberation among employees of federal agencies” is also unfounded  
8 given that the facts the government now seeks to hide—those surrounding a February 14,  
9 2017 meeting, including its attendees and topics discussed—have been widely  
10 disseminated through extensive public reporting and public congressional testimony. For  
11 instance, *The Atlantic* reported that “[o]n Valentine’s Day 2017, Kevin McAleenan, now  
12 the acting head of Customs and Border Protection, hosted a large meeting with  
13 representatives of CBP, ICE, HHS, and a smattering of White House Hawks.” Caitlin  
14 Dickerson, *We Need to Take Away Children: The Secret History of the U.S. Government’s*  
15 *Family-Separation Policy*, THE ATLANTIC (Aug. 7, 2022), Dkt. 302-6 at 29. Attendees  
16 described the meeting as “like a pep rally, with two deputies of [ICE Director] Tom  
17 Homan’s—Matt Albence and Tim Robbins—announcing their plans for securing the  
18 border, which included separating migrant families.” *Id.* at 30. *The Atlantic* later reported  
19 that at the February 14, 2017 meeting, “immigration-enforcement officials presented a  
20 nationwide plan to separate families as an immigration deterrent. . . . The plan was also  
21 leaked to the media, after which Homeland Security officials began to assert publicly that  
22 the idea had been abandoned. In reality, during and after regional separation programs  
23 were implemented in Texas, Arizona, and New Mexico, the nationwide plan was still  
24 being pushed aggressively by leaders of the immigrant-enforcement agencies, as well as  
25 by Stephen Miller, President Donald Trump’s chief immigration adviser, and Gene  
26 Hamilton, a confidant of Miller’s who worked at DHS and the Department of Justice.”  
27 Ex. A, Caitlin Dickerson, *The Family-Separation Files*, THE ATLANTIC (Dec. 31, 2022),  
28 at 2.

1        *American Oversight* further reported that “officials discuss[ed] family separation  
2 as a potential policy option for ending ‘catch and release’” during the February 14, 2017  
3 meeting, that a “focus of the meeting” was “joint DHS, DoJ, and HHS plans for  
4 addressing unaccompanied minors and their parents/sponsors in the U.S.,” that ORR  
5 Commander Jonathan White “recalled the meeting in later congressional testimony,” and  
6 that “the tone of the discussion was ‘If we go this route, we need to be ready.’” Ex. B, *A*  
7 *Timeline of the Trump Administration’s Family Separation Policy*, AMERICAN  
8 OVERSIGHT (Jan. 4, 2023), at 3. Defendant does not explain how granting public access  
9 to the material it cites will have a chilling effect when the circumstances surrounding the  
10 February 14, 2017 meeting are already publicly known.

11        Last, Defendant only vaguely states that there are “law enforcement concerns”  
12 raised by McAleenan’s testimony. Def.’s Mot. to Seal at 3. But Defendant does not offer  
13 any reason, much less a sufficiently compelling or specific one, to justify sealing on this  
14 ground. Defendant does not identify any specific law enforcement concerns, nor does it  
15 explain how the release of this testimony—about a meeting regarding “the development  
16 of immigration policy” that occurred over six years ago and again is very much in the  
17 public domain—could raise law enforcement concerns. *Id.*

18        In short, Defendant fails to meet the “compelling reasons” test to seal the excerpt  
19 of McAleenan’s testimony that Defendant submitted to support its opposition to  
20 Plaintiffs’ Motion for Partial Summary Judgment. Accordingly, Plaintiffs respectfully  
21 request that the Court deny Defendant’s Motion to Seal with respect to Exhibit D.

1 RESPECTFULLY SUBMITTED this 27th day of April, 2023.

2 By: Travis C. Hunt

3 OSBORN MALEDON, P.A.

David B. Rosenbaum (009819)

4 Travis C. Hunt (035491)

5 BriAnne N. Illich Meeds (036094)

6 ARNOLD & PORTER KAYE SCHOLER LLP

Diana E. Reiter\*

7 Erik Walsh\*

8 Lucy McMillan\*

Harry K. Fidler

Kaitlyn Schaeffer\*

9 Brian Auricchio\*

Julia Kindlon\*

10 250 West 55th Street

New York, NY 10019-9710

11 Telephone: (212) 836-8000

diana.reiter@arnoldporter.com

12 erik.walsh@arnoldporter.com

lucy.mcmillan@arnoldporter.com

13 harry.fidler@arnoldporter.com

kaitlyn.schaeffer@arnoldporter.com

14 brian.auricchio@arnoldporter.com

15 julia.kindlon@arnoldporter.com

16 ARNOLD & PORTER KAYE SCHOLER LLP

R. Stanton Jones\*

David Hibey\*

17 Emily Reeder-Ricchetti\*

601 Massachusetts Avenue, NW

18 Washington, DC 20001

Telephone: (202) 942-5000

19 stanton.jones@arnoldporter.com

david.hibey@arnoldporter.com

20 emily.reeder-ricchetti@arnoldporter.com

21 ARNOLD & PORTER KAYE SCHOLER LLP

Sean Morris\*

22 777 South Figueroa Street

Los Angeles, CA 90017-5844

23 sean.morris@arnoldporter.com

24 KAIRYS, RUDOVSKY, MESSING, FEINBERG & LIN LLP

Jonathan H. Feinberg\*

25 The Cast Iron Building

26 718 Arch Street, Suite 501 South

Philadelphia, PA 19106

Telephone: (215) 925-4400

27 jfeinberg@krlawphila.com

28

1 NATIONAL IMMIGRANT JUSTICE CENTER

Mark Fleming\*

2 Mark Feldman\*

224 S. Michigan Ave., Suite 600

3 Chicago, IL 60604

Telephone: (312) 660-1370

4 mfleming@heartlandalliance.org

mfeldman@heartlandalliance.org

6 NATIONAL IMMIGRATION LITIGATION ALLIANCE

Trina Realmuto\*

7 Mary Kenney\*

10 Griggs Terrace

8 Brookline, MA 02446

Telephone: (617) 819-4447

9 trina@immigrationlitigation.org

mary@immigrationlitigation.org

10 AMERICAN IMMIGRATION COUNCIL

11 Katherine Melloy Goettel\*

Emma Winger\*

12 Gianna Borroto\*

1331 G Street NW, Suite 200

13 Washington, DC 20005

Telephone: (202) 507-7512

14 Telephone: (202) 742-5619

kgoettel@immcouncil.org

15 ewinger@immcouncil.org

gborroto@immcouncil.org

16 *Attorneys for Plaintiffs C.M. et al.*

17 \* *Admitted pro hac vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 27, 2023, I electronically file the foregoing with the Clerk of the Court via the Court's Electronic Filing System, which will provide electronic notification to all filing users.

/s/Lauren Dwyer